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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 In re TD AMERITRADE ) Case No C 07 2852 VRW  
13 ACCOUNT HOLDER LITIGATION )  
14 ) CLASS ACTION  
15 ) **CLASS MEMBER ELLI**  
16 ) **WEINSTEIN’S OBJECTION TO**  
17 ) **SETTLEMENT AND NOTICE**

18 Class Member Elli Weinstein, by her undersigned counsel, hereby objects  
19 to the Settlement and Notice. The timing of opt-out and objection deadlines to  
20 occur before submission of papers to support the Settlement and Fee Application  
21 denies Class members of their fundamental right to sufficient information to  
22 make informed decisions. Thus, the procedures in the case may have the *form* of  
23 notice, but they lack the *substance* of meaningful notice.  
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**OBJECTION:**

**CLASS MEMBERS HAVE BEEN DENIED MEANINGFUL NOTICE AS REQUIRED BY RULE 23 AND DUE PROCESS OF LAW, BECAUSE THEY MUST OPT OUT OR OBJECT BEFORE THE MOTION FOR FINAL SETTLEMENT APPROVAL AND FEE APPLICATION HAVE BEEN FILED.**

Rule 23 of the Federal Rules of Civil Procedure and due process of law, as secured by the Fifth Amendment to the United States Constitution, require that notice to the Class provide meaningful information so Class members can evaluate the proposed Settlement and related requests for \$1,870,000.00 in attorneys' fees, for reimbursement of costs up to \$9,000.00, and \$2,000.00 in incentive awards for the services of class representatives (collectively "Fee Application").

The notice must be the *best practicable*, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them *an opportunity to present their objections.*" *Mullane [v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950)]*; cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-175, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974).

*Silber v. Mabon*, 18 F.3d 1449, 1454 (9<sup>th</sup> Cir. 1994) (emphasis added). See Preliminary Approval Order (Document 93) at 9 ("Class members are entitled to the 'best notice practicable under the circumstances.' FRCP 23(c)(2)(B)."). Thus, Class members are entitled to the "best notice" that is practicable, not merely a modicum of notice.

1           The notice in this case is not the best notice practicable under the circum-  
2           stances. The sequence of proceedings related to approval of the Settlement pre-  
3           cludes the Class, including this Objector, from receiving rudimentary information  
4           for valuing the Settlement and assessing the Fee Application. This is a serious de-  
5           ficiency, since in granting preliminary approval of the Settlement the Court was  
6           “particularly concerned that TD Ameritrade has agreed to pay the class counsel  
7           \$1.87 million ... and yet the class itself will receive no monetary award.” Prelimi-  
8           nary Approval Order (Document 93) at 7-8. The Court also observed that the  
9           original settlement negotiations, during which the parties agreed on the nearly  
10          \$2 million in fees, were insufficiently adversarial. *See id.* at 8 (“The Texas Attor-  
11          ney General injected the negotiations with a needed dose of adversarial  
12          process.”).

13           Before the Court may give final approval to the Settlement or grant the  
14          Fee Application, Class Counsel must file moving papers. *See Fed.R.Civ.P. 7(b)*  
15          (“A request for a court order must be made by motion.”). In doing so, Class  
16          Counsel must sustain the burden of justifying the Settlement. *See Ybarrondo v.*  
17          *NCO Fin. Sys.*, No. 05 cv 2057-L(JMA), 2008 U.S. Dist. Lexis 4353 at \*5 (S.D. Cal.  
18          Jan. 18, 2008); *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, MDL Dkt. No.  
19          901, 1992 U.S. Dist. Lexis 14337 at \*6 (C.D. Cal. June 10, 1992). When, like here, a  
20          settlement “take[s] place prior to formal class certification,” it must meet “a high-  
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1 er standard of fairness,” and in that regard “the reaction of the class members to  
2 the proposed settlement” is relevant and must be considered. *Molski v. Gleich*, 318  
3 F.3d 937, 953 (9<sup>th</sup> Cir. 2003) (class settlement approval reversed). In part this is  
4 because the class members “can no longer depend on their attorneys’ rigorous  
5 adherence to their fiduciary duties.” *In re Tableware Antitrust Litig.*, 2007-2 Trade  
6 Cas. (CCH) ¶ 75,979, 2007 U.S. Dist. Lexis 89998 at \*5 (N.D. Cal. Nov. 28, 2007)  
7 (Walker, C.J.). See *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d  
8 768, 801 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) (“class attorneys ... owe the en-  
9 tire class a fiduciary duty once the class complaint is filed”) (quoted with ap-  
10 proval by the Ninth Circuit in *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9<sup>th</sup> Cir.  
11 2003)).

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17 A similar standard applies to consideration of the Fee Application. “The  
18 court is obligated to conduct an independent inquiry into the reasonableness of  
19 any attorney fee provisions of a class action settlement even in the face of an  
20 agreement between the parties regarding the payment and amount of attorney  
21 fees and costs.” *Martin v. FedEx Ground Package Sys.*, 2008 U.S. Dist. Lexis 106524  
22 at \*14 (N.D. Cal. Dec. 31, 2008) (Walker, C.J.) As with approval of the Settlement,  
23 Class Counsel bear the burden of establishing their entitlement to any attorneys’  
24 fees or related award. See *Wallace v. Full Spectrum Lending, Inc.*, No. CV 05-560  
25 AHS (RNBx) 2006 U.S. Dist. Lexis 88582 at \*18 (C.D. Cal. Nov. 28, 2006); *In re For-*

1 *tune Systems Sec. Litig.*, No. C-83-3348(A) WHO, 1988 U.S. Dist. Lexis 18503 at \*19  
2 (N.D. Cal. Aug. 31, 1988). To sustain that burden counsel must include, at a min-  
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4 imum, lodestar information — hours and rates by attorney — in a case like this  
5 one where there is no common fund to which a percentage approach could be  
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7 applied. *See In re Chiron Corp. Sec. Litig.*, No. C-04-4293 VRW, 2007 U.S. Dist. Lex-  
8 is 91140 at \*25 (N.D. Cal. Nov. 30, 2007) (Walker, C.J.). “[C]lass counsel need to  
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10 justify both the application of a multiplier and its level as much as they need to  
11 show that their hourly rates are in line with competitive norms.” *Id.* at \*24. *See*  
12 *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2007 U.S. Dist. Lexis 27269 at \*16  
13  
14 (N.D. Cal. Mar. 28, 2007) (Walker, C.J.).

15         Just as the information described above is essential for a court’s evalua-  
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17 tion, Class members need access to the moving papers to appraise the Settlement  
18 and the Fee Application, and to weigh what course of action they wish to take.  
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20 This position was expressly adopted by the Advisory Committee on the 2003 ad-  
21 dition of Federal Rule of Civil Procedure 23(h)(1), which considered it “impor-  
22 tant to require the filing of at least the initial motion [for fees] in time for inclu-  
23 sion of information about the motion in the notice to the class about the proposed  
24 settlement that is required by Rule 23(e).” Fed. R. Civ. P. 23(h)(1), *Advisory Com-*  
25 *mittee Notes*. With the initial substantive motions available to them, Class mem-  
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27 bers can attempt to analyze whether Class Counsel were in fact looking out for  
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1 the Class's best interests in negotiating the Settlement. After all, "[i]f ... class  
2 counsel agreed to accept excessive fees and costs to the detriment of class plain-  
3 tiffs, then class counsel breached their fiduciary duty to the class." *Lobatz v. U.S.*  
4 *West Cellular of Cal., Inc.*, 222 F.3d 1142, 1147 (9<sup>th</sup> Cir. 2000).

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6 This approach is also consistent with an attorney's duty to communicate  
7 with her or his client under Rule 3-500 of the California Rules of Professional  
8 Conduct: "A member shall keep a client reasonably informed about significant  
9 developments relating to the employment or representation, including promptly  
10 complying with reasonable requests for information and copies of significant  
11 documents when necessary to keep the client so informed." *See* Local Civil Rule  
12 11-4 (a)(1) (requiring compliance "with the standards of professional conduct re-  
13 quired of members of the State Bar of California"). While Class members are not  
14 Class Counsel's named clients, the Notice informs Class members, under the  
15 heading "Who Represents You," that "[t]he court has approved the following  
16 law firm [KamberEdelson, LLC] to represent the Settlement Class."

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18 Since Class Counsel serve in a fiduciary capacity to all Class members, the  
19 resultant fiduciary duty surely encompasses the duty of communication dis-  
20 cussed here. *See* Restatement, Second, Trusts, § 170(2) (1959) ("The trustee in  
21 dealing with the beneficiary on the trustee's own account is under a duty to the  
22 beneficiary to deal fairly with him and to communicate to him all material facts  
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1 in connection with the transaction which the trustee knows or should know.”).

2 The comment to § 170(2) makes clear that “[t]he relation between the trustee and  
3 the beneficiary” is “a fiduciary relation.”  
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5         Yet, at the request of Class Counsel, the schedule in this case requires  
6 Class members to commit either to opt out of the Class or to state their objections  
7 by July 9, 2009, which is well *before* Class Counsel attempt to sustain their burden  
8 of proof in support of the Settlement and of the Fee Application. Those motion  
9 papers are not due until August 20, 2009. Thus, Class members’ decisions must  
10 be made in a vacuum without any meaningful information. This is particularly  
11 objectionable because the proposed sequence of events was structured in the first  
12 instance by Class Counsel, in disregard of the Class’s right to the best notice  
13 practicable under the circumstances and despite Class Counsel’s fiduciary duty  
14 to the Class to look out for its wellbeing.  
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19         The Notice available to the Class on the website fails to provide the essen-  
20 tials that Class members need. *See* Exhibit A to the Declaration of David H.  
21 Weinstein. The Notice provides no estimate of the value of the Settlement (or of  
22 the claims being released), offers no explanation of how the Fee Application for  
23 almost \$2 million is reasonable, and fails even to inform Class members that they  
24 have the right to object to the Fee Application, separate and apart from the Set-  
25 tlement. For example, Section 10 of the Notice (“Your Options”) fails to mention  
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1 an option to object to the Fee Application, while Section 7 gives no factual infor-  
2 mation to support the wholly conclusory, *ipse dixit* assertion that Class Counsel  
3 believe the Settlement is in the best interests of the Class.  
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5 This Class member requested — but Class Counsel failed to provide —  
6 the very information at issue here. Her email to Class Counsel stated:  
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8 I received a notice and have a number of questions about the TD Ameri-  
9 trade settlement. The website said I should send the questions to this  
10 email address.

11 First, how much is the settlement worth and how did you determine it?

12 Second, have you filed any papers to justify why the settlement should be  
13 approved at the Sept. 10 hearing?

14 Third, have you filed any papers to justify the fees and expenses you are  
15 seeking?

16 Please send me right away (email is fine) whatever you have already filed.  
17 I would like to receive these in time to review them before the July 9 dead-  
18 line. Also, please send me anything else you file later.

19 Exhibit A, email message from Elli Weinstein to stockspamsettle-  
20 ment@kamberedelson.com, dated July 1, 2009. In response, Class Counsel stated:

21 Attached is a copy of the papers for preliminary approval. Papers have  
22 not been filed yet for the final approval hearing, including the request for  
23 the fees and expenses. ***They will not be filed prior to the July 9th dead-***  
24 ***line.*** If you have additional questions, or are seeking additional docu-  
25 ments, please let me know.

26 *Id.*, reply email message from Kris Alspach of KamberEdelson to Elli Weinstein,  
27 dated July 1, 2009 (emphasis added).

28 In these circumstances, the entire notice process has been inadequate and  
surely not the best notice practicable under the circumstances. “The court should



1 be party to nothing that fails fully to inform the class of the settlement terms.”  
2 *Chiron Corp.*, 2007 U.S. Dist. Lexis 91140 at \*29-\*30. As the Advisory Committee  
3 Note to Rule 23(h)(1) indicates, the same holds true for the Fee Application. In  
4 *GMC Pick-Up Truck*, 55 F.3d at 803, the Third Circuit disapproved of “a practice  
5 where the class is, for practical purposes, deprived of information concerning the  
6 fees.” The court explained that, if armed with the pertinent information concern-  
7 ing the requested fees, class members may “oppose not only the awards but, al-  
8 so, to the extent they conclude that arm’s length negotiations were compromised,  
9 the adequacy of the settlement ....” *Id.* at 803 n.23.  
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14 A remedy is available in this situation which is not drastic. The Final Ap-  
15 proval Hearing should be rescheduled, and a new notice to the Class members  
16 should provide them with a renewed opportunity to consider opting out of the  
17 Class (or returning to the Class if they have already excluded themselves) or ob-  
18 jecting to the Settlement or Fee Application. The deadlines for doing so should be  
19 a reasonable period, perhaps 20 days, *after* Class Counsel have filed their motion  
20 for final approval of the Settlement and their Fee Application. In the Settlement  
21 Agreement (Paragraph D of Section VI) the parties have already provided that  
22 “[t]he cost of the Notice, the Notice Plan as outlined herein, and the dissemina-  
23 tion of the Notice shall be borne solely by the Company.”  
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1 WHEREFORE, Class Member Elli Weinstein objects to the Settlement and  
2 Notice. She intends to appear at the Final Approval Hearing through counsel and  
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4 to present this Objection for the Court's consideration at that time. She also re-  
5 serves her right, in the event this Objection is sustained, to seek reasonable attor-  
6 neys' fees and costs related to this Objection, and to object substantively to the  
7 Settlement and Fee Application if more information about them is revealed to the  
8 Class.  
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11 Respectfully submitted,

12 Dated: July 9, 2009

/s/ David H. Weinstein

13 DAVID H. WEINSTEIN (SBN 43167)  
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18 Fax: (215) 545-6535  
19 Email: weinstein@wka-law.com

20 Attorneys for Class Member  
21 Elli Weinstein

22 **CERTIFICATE OF SERVICE**

23 I hereby certify this ninth day of July, 2009, that today I caused the fore-  
24 going Class Member Elli Weinstein's Objection to Settlement and Notice, and ac-  
25 companying Entry of Appearance, Declaration of Elli Weinstein, Declaration of  
26 David H. Weinstein, and Certification of Interested Entities or Persons to be filed  
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1 by ECF (electronic case filing) and thereby made available to all parties and  
2 counsel of record thereto. In addition, in accordance with the Notice in this case,  
3  
4 I have this day caused a true copy of each of the aforesaid documents to be  
5 served by First Class U.S. Mail to:

6  
7 KamberEdelson, LLC  
8 350 North LaSalle, Suite 1300  
9 Chicago, IL 60654

Mayer Brown LLP  
71 S. Wacker Drive  
Chicago, IL 60606

10 Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.

11 */s/ David H. Weinstein*  
12 David H. Weinstein (SBN 43167)

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